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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of **APPLICATIONS BY SBC COMMUNICATIONS, INC. AND SOUTHERN NEW ENGLAND TELEPHONE CORPORATION FOR CONSENT FOR A PROPOSED TRANSFER OF CONTROL**	CC Docket No. 98-25

PETITION OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION TO DENY OR TO DEFER ACTION

The Personal Communications Industry Association ("PCIA")[1] respectfully submits this Petition to Deny or Defer Action upon the applications filed by SBC Communications, Inc. ("SBC") and Southern New England Telecommunications Corporation ("SNET"), requesting Commission approval of their proposed merger and associated transfers of control. PCIA urges the Commission to deny the applications on the ground that it is not in the public interest to permit SBC to expand into a new territory until such time as it demonstrates full compliance with its interconnection obligations with respect to paging companies and other providers of commercial mobile radio services ("CMRS").[2] In complete disregard for the Commission's rules, SBC continues to *charge* CMRS carriers, in particular those who provide paging services,[3]

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1 PCIA is the international trade association that represents the interests of both commercial and private mobile radio service providers. PCIA's Federation of Councils includes the Paging and Narrowband PCS Alliance; the Broadband PCS Alliance; the Mobile Wireless Communications Alliance; the Site Owners and Managers Association; the Association of Communications Technicians; and the Private System Users Alliance.

2 An express finding by the Commission that the instant application is not in the public interest based on SBC's failure to comply with CMRS-LEC interconnection rules would be squarely within the Commission's unquestioned jurisdiction over CMRS-LEC interconnection.

3 PCIA represents both traditional paging service providers and narrowband PCS licensees. As used in these comments, the term "paging" is intended to embrace narrowband PCS as well.

for *SBC-originated* traffic. SBC also refuses to pay compensation to paging carriers for terminating SBC-originated traffic. The SBC LECs are also threatening to disrupt existing service to the public by unilaterally altering current interconnection arrangements in violations of their obligations. These practices violate specific provisions of the Telecommunications Act of 1996, the regulations adopted by the Commission both before and after that Act, and the Commission's long-standing policy of interconnection between local exchange carriers ("LECs") and CMRS providers.

In the alternative, the Commission should at the very least defer or condition any approval of the merger and authorization transfers pending SBC's demonstration of compliance with its interconnection obligations. SBC's longstanding abuse of its market dominance throughout the regions it serves should not go unaddressed by the Commission as it determines whether SBC should be permitted to expand to yet another region of the country.

SBC Is Not Complying with Its Interconnection Obligations

The Commission has long recognized that both wireline and mobile service providers are carriers, and that each should be obligated to interconnect for the purpose of terminating the other's traffic.[4] Over ten years ago, the Commission expressly stated that wireline/cellular interconnection should be based on the principle of "mutual compensation" — that is, that mobile service providers and LECs "are equally entitled to just and reasonable compensation for their provision of access."[5] The Commission adopted these policies pursuant to section 201 of the Communications Act of 1934.[6]

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4 *Cellular Communications Systems,* 86 F.C.C. 2d 469, 496 (1981), *recon.,* 89 F.C.C. 2d 58 (1982).

5 *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services,* 2 F.C.C. Rcd. 2910, 2915 (1987), *recon.,* 4 F.C.C. Rcd. 2369 (1989).

6 47 U.S.C. § 201.

When Congress amended the Communications Act in 1993 to create a comprehensive federal framework for commercial mobile radio services,[7] the Commission reaffirmed its compensation policies and extended them to all CMRS providers.[8] The Commission adopted a new regulation on LEC-CMRS interconnection that expressly requires "mutual compensation."[9] LECs must pay CMRS providers "reasonable compensation . . . in connection with terminating traffic that originates on facilities of the local exchange carrier," and CMRS providers must pay LECs for terminating CMRS-originated traffic.[10] By requiring LECs to *compensate* CMRS providers for LEC-originated traffic (and *vice versa*), the regulation logically prohibits any LEC from *collecting* from a CMRS provider for LEC-originated traffic. The Commission has confirmed that LEC attempts to charge CMRS providers for LEC-originated traffic violate section 20.11 of the Commission's rules.[11]

These same obligations were independently imposed by the Telecommunications Act of 1996.[12] Section 251(b)(5) of the Act requires all LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[13] Paging providers, like all other CMRS providers, transport and/or terminate "telecommunications." Thus, the

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7 47 U.S.C. § 332. Section 332 expanded the Commission's authority under section 201 of the Act to order interconnection requested by CMRS providers. 47 U.S.C. § 332(c)(1)(B).

8 *Implementation of Sections 3(n) and 332 of the Communications Act,* 9 F.C.C. Rcd. 1411, 1497-1501 (1994).

9 47 C.F.R. § 20.11(b), *reprinted as originally adopted at* 9 F.C.C. Rcd. 1411, 1520-21.

10 *Id.*

11 *Local Interconnection Order,* 11 F.C.C. Rcd. at 16044 ("we conclude that, in many cases, incumbent LECs . . . imposed charges for traffic originated on CMRS providers' networks, . . . in violation of section 20.11 of our rules"). While the Commission has invoked sections 251 and 252 of the Telecommunications Act of 1996 to promulgate new interconnection requirements in Part 51 of the Commission's rules (discussed below), the Commission retains its section 332 jurisdiction, *Local Interconnection Order,* 11 F.C.C. Rcd. at 16005, as exercised in section 20.11 of the Commission's rules.

12 Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.*

13 47 U.S.C. § 251(b)(5). Significantly, this is an obligation so fundamental that it is imposed on *all* LECs, not just incumbents.

reciprocal compensation obligation of section 251(b)(5)—which forbids LEC charges for LEC-originated traffic — applies to paging providers as well as other CMRS providers. The Commission made this explicit in its *Local Interconnection Order,*[14] where it stated, "[a]ll CMRS providers offer telecommunications. Accordingly, LECs are obligated pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, *including paging providers,* for the transport and termination of traffic on each other's networks, pursuant to the rules governing reciprocal compensation . . . ."[15]

The Commission has also noted that section 251(b)(5), by requiring the LEC to *compensate* the CMRS provider for LEC-originated traffic, necessarily prohibits any arrangement by which the LEC *charges* the CMRS provider for LEC-originated traffic.[16] The Commission ordered that LECs immediately cease assessing such charges[17], and codified its interpretation in section 51.703(b) of its rules. That rule states as plainly as possible that "[a] LEC *may not assess charges* on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network."[18] The issue of paging carriers' entitlements was briefed before the Eighth Circuit in *Iowa Utilities Board v. FCC*, which affirmed the Commission's reciprocal compensation rule.[19] That ruling has not been appealed.

Despite the clarity with which the Commission has repeatedly spoken on this issue, SBC has failed to comply with its obligations. Recently, SBC attempted to justify its failure to follow

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14 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 F.C.C. Rcd. 15499 (1996) ("*Local Interconnection Order*").

15 *Local Interconnection Order,* 11 F.C.C. Rcd. at 15997 (emphasis added). *See also id.* at 16016.

16 *Id.* at 16016.

17 *Local Interconnection Order*, 11 F.C.C. Rcd. at 16016.

18 47 C.F.R. § 51.703 (1996) (emphasis added).

19 *See Iowa Utilities Board v. FCC,* 120 F.3d 753, 800 n.21 (8th Cir. 1997).

51.703(b) on the theory that it was charging paging providers for the use of facilities to transport telecommunications traffic, as opposed to charging for transporting the traffic itself. This theory was summarily rejected recently in a letter from the Common Carrier Bureau to, among others, Southwestern Bell Telephone ("SWBT"), an affiliate of SBC. Relying on section 51.703, the letter stated that:

> [g]iven the Commission's clear statement that LECs must provide traffic originating on their networks to CMRS carriers "without charge," the Bureau finds no basis for the argument advanced by SWBT that LECs are permitted to assess charges on CMRS carriers to recover the costs of facilities that are used by LECs to deliver traffic to CMRS carriers. Accordingly, we conclude that the Commission's current rules do not allow a LEC to charge a provider of paging services for the cost of LEC transmission facilities that are used on a dedicated basis to deliver to paging service providers local telecommunications traffic that originates on the LECs network.[20]

Consistent with its past behavior, SBC has ignored this clear admonition from the Common Carrier Bureau. Despite the strictures of directly applicable regulations in Parts 51 and 20,[21] and the Commission's many previous efforts to facilitate fair interconnection between LECs and paging providers for at least ten years prior to the passage of the Telecom Act of 1996, *SBC has continued to charge paging providers for the facilities used to transport SBC-originated traffic to paging networks, and has failed to pay paging providers for terminating SBC's traffic.* SBC's recent treatment of paging provider Metrocall illustrates its recent approach. Justifying its threat to "take all appropriate action," in response to Metrocall's refusal to pay illegal facilities charges, SBC informed Metrocall that "we strongly disagree that either the FCC's local transport rules or the Bureau's December 30, 1997 letter provides any justification for Metrocall's refusal

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20 Letter from A. Richard Metzger, Jr. to Keith Davis *et. al.* (December 30, 1997).

21 Independent of the Part 51 requirements, section 20.11 of the Commission's rules, also prohibits LECs from charging for LEC-originated traffic. Section 20.11 applies without regard to any Part 51 rule. *Local Interconnection Order,* 11 F.C.C. Rcd. at 16044, 16044 n.2633.

to pay for facilities that it has ordered."[22] Contrary to SBC's assertion, it is difficult to imagine how the Common Carrier Bureau could have been more direct, or how the rules could be any clearer. The Commission should not tolerate this illegal strategy of obfuscation, particularly when implemented by a LEC with the market dominance of SBC.[23] In the interest of promoting a healthy and truly competitive telecommunications market, the Commission should make clear to SBC that it must comply with effective and duly promulgated laws and regulations, even when it "strongly disagree[s]."

The need for Commission action is further demonstrated by events which followed the acquisition of Pacific Telesis by SBC. PCIA's paging members report that interconnection progress came to an immediate halt when SBC assumed control of Pacific Telesis and SBC's "hard-line" approach was imposed. The Commission should not allow this history to repeat itself by allowing SNET — which has in fact modified local tariffs to comply with FCC interconnection requirements[24] — to be acquired by a company that flouts FCC requirements.

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22 Letter from Keith E. Davis to Frederick M. Joyce (March 11, 1998), attached as Exhibit A.

23 It should also be noted that Parts 51 and 20 are fully effective. *See* Summary of Currently Effective Commission Rules for Interconnection Requests by Providers of Commercial Mobile Radio Services, 12 F.C.C. Rcd. 15591 (rel. September 30, 1997). SBC has asked the Commission to change the rules by filing a procedurally defective Petition for Stay and Application for Review of the Bureau's letter interpreting section 51.703(b). Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell's Petition for Stay Pending Commission Review, CCB/CPD Docket No. 97-24 (filed January 30, 1998) ("Petition for Stay"); Application for Review of Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell (filed January 29, 1998), CCB/CPD Docket No. 97-24 ("Application for Review"). Even if it were possible to circumvent the Commission's reconsideration procedure by seeking a stay of the Bureau's interpretation, which it is not, SBC does not have the right ignore rules that are currently in effect. *See* Opposition of the Personal Communications Industry Association to the Petition for Stay, CCB/CPD Docket No. 97-24 (filed February 10, 1998). As it has done for years, SBC is attempting to unilaterally impose its own stay of the Commission's regulations.

24 Lettter from James A. Van Der Beek to Dennis M. Doyle (February 4, 1997), attached as Exhibit B.

The Commission Should Exercise its Authority under the Communications Act and the Clayton Act to Either Deny the Transfer of SNET Licenses, or to Condition its Approval on SBC's Demonstration of Compliance with its Interconnection Obligations.

Under the Communications Act and the Clayton Act, the Commission must evaluate whether the SBC and SNET merger furthers the public interest. SBC and SNET have applied for approval under Sections 214 and 310(d) of the Communications Act. Section 214(a) of the Communications Act provides that no common carrier shall acquire any line "unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" the operation of the line.[25] Similarly, Section 310(d) of the Communications Act provides that no station license may be transferred, assigned or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby."[26] As part of its public interest inquiry under the Communications Act, the Commission examines whether the proposed merger furthers or hinders the pro-competitive, deregulatory goals of the 1996 Act.[27] The Commission also has authority pursuant to the Clayton Act to review proposed mergers of common carriers and negotiate through a consent order such conditions as the public interest may require.[28] Section 214(c) of the Communications Act authorizes the Commission to attach to the certificate

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25 47 U.S.C. § 214.

26 47 U.S.C. § 310(d).

27 *NYNEX Corp and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, 12 F.C.C. Rcd. 19985, ¶ 31 (1997)

28 15 U.S.C. §§ 18, 21; *see NYNEX and Bell Atlantic*, at ¶29.

authorizing any transfer "such terms and conditions as in its judgment the public convenience and necessity may require."[29]

Approval of the SBC-SNET merger would not be in the public interest unless SBC commits in a legally binding fashion to abide, and demonstrates that it in fact does abide, by the Commission's interconnection rules. It is appropriate for the Commission to consider SBC's failure to fulfill its interconnection obligations in determining whether it would further the public interest to permit this merger to proceed. By its actions, SBC has demonstrated that it is willing and able to take advantage of market dominance. It has leveraged its near-monopoly status to dictate terms to paging and other CMRS carriers. These carriers are forced to continue dealing with SBC because they would be foreclosed from offering service in SBC's regions if they boycotted or refused to pay what SBC demands. Acquiring SNET would give SBC market dominance in Connecticut, and yet another chance to illegally leverage its market power. Given this monopolistic abuse, it is entirely appropriate for the Commission to deny its approval, or at the very least, condition any approval on SBC's demonstration of compliance.[30]

While it is true that there are several proceedings pending in which the Commission will have the opportunity to address reciprocal compensation for CMRS providers,[31] SBC's record regarding its willingness to abide by the Commission's rulings on compensation for paging and other CMRS carriers demonstrates that the Commission should not forego this opportunity to

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29 47 U.S.C. § 214(c). *See, NYNEX Corp and Bell Atlantic Corp.*, 12 F.C.C. Rcd. 19985, ¶ 30 (1997); *MCI Communications Corp*, 9 FCC Rcd 3960, 3968 ¶ 39 (1994); *Sprint Corp.*, 11 FCC Rcd 1850, 1867-72 ¶¶ 100-133 (1996).

30 When approving the merger between Bell Atlantic and NYNEX, the Commission attached conditions that mirrored those imposed by section 251 and 252 of the Communications Act. *NYNEX Corp. and Bell Atlantic Corp.*, at ¶ 216.

31 *See* e.g., Requests for Clarification of the Commission's Rules Regarding Interconnection Between LECs and Paging Carriers, CCB/CPD Docket No. 97-24; Formal Complaint of Metrocall Against Various LECs, File No. E-98-14-18; Petition for Stay; Letter from Michael K. Kellogg to A. Richard Metzger, Jr. (March 19, 1998) (suggesting that the Common Carrier Bureau Chief "clarify" that LECs may charge paging carriers for LEC-originated calls).

enforce its rules. The Commission's interconnection regulations seek to avoid just the sort of monopolistic abuse committed by SBC. As discussed above, however, SBC has been able to dodge compliance with those rules for years. Allowing SBC to proceed with the merger despite its refusal to follow the Commission's rules would undermine the Commission's enforcement credibility, and therefore the pro-competitive goals of the 1996 Act. SBC should not be permitted to expand to a new market without at least a firm commitment that it will break with its illegal past practices.

The Commission has previously announced that swift implementation of reciprocal compensation for LEC-CMRS interconnection is essential to the public interest. Indeed, in a Notice of Proposed Rulemaking released less than a month before the Telecom Act was signed into law, the Commission stated that "[a]ny significant delays in the resolution of issues related to LEC-CMRS interconnection compensation arrangements, combined with the possibility that LECs could use their market power to stymie the ability of CMRS providers to interconnect (and may have incentives to do so), could adversely affect the public interest." [32] Congress underscored the public interest in reciprocal compensation by expressly incorporating it into the 1996 Act. Yet more than two years have passed since that time and SBC continues to insist on being paid by CMRS providers for traffic SBC originates. This is, by any standard, a "significant delay," that has "adversely affect[ed] the public interest."[33] Surely the public interest in eradicating these unfair charges is not less important now that Congress has spoken, nor less urgent now that two more years have passed without compliance.

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[32] *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 F.C.C. Rcd. 5020, 5047 (1996).

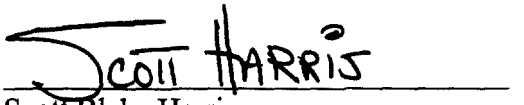
[33] *Id.*, 11 F.C.C. Rcd. at 5047.

CONCLUSION

For the reasons set forth above, SBC is not in compliance with the Commission's interconnection rules. To approve its application to merge with and acquire the licenses and authorizations of SNET would be decidedly contrary to the public interest. PCIA therefore urges the Commission either to deny the applications or at the very least condition them on demonstration by SBC of its compliance with the Commission's interconnection requirements.

Respectfully submitted,

THE PERSONAL COMMUNICATIONS
INDUSTRY ASSOCIATION



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March 30, 1998

CERTIFICATE OF SERVICE

I, Evan R. Grayer, hereby certify that copies of the foregoing "Petition to Deny or to Defer Action" were served, by hand delivery, upon the following this 30th day of March, 1998:

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Common Carrier Bureau
1919 M Street, N.W.
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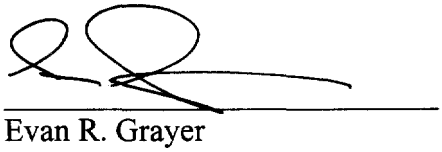

Evan R. Grayer

ATTACHMENT A

Southwestern Bell Telephone

March 11, 1998

Via Airborne
Mr. Frederick M. Joyce
Joyce & Jacobs
Fourteenth Floor
1019 19th Street, NW
Washington, DC 20036

Kelly E. Davis
Attorney

Re: Metrocall Local Interconnection

Dear Mr. Joyce:

I am writing in response to your letter to Ms. Christine Jines dated March 3, 1998, stating your client's intention, unilaterally, to cease paying for facilities ordered by your client pursuant to tariff from Southwestern Bell Telephone Company and pursuant to contracts from Pacific Bell.

As you know from your active participation in Docket No. 97-24, we strongly disagree that either the FCC's local transport rules or the Bureau's December 30, 1997, letter provides any justification for Metrocall's refusal to pay for facilities that it has ordered. Your client's refusal to pay amounts due and owing under these existing tariffs and contracts is unlawful and Southwestern Bell Telephone Company and Pacific Bell reserve the right to take any and all appropriate action in response.

You may rest assured, however, that, pursuant to standard procedures, Metrocall will be notified well in advance of any decision to terminate any facilities or services provided to it.

Very truly yours,

cc: Robert W. Spangler, Chief/FCC Enforcement Division
Debra S. Sabourin, Staff Atty/FCC Enforcement Division

One Bell Plaza
Room 2900
P.O. Box 655521
Dallas, Texas 75265-5521

Phone 214 464-8583
Fax 214 464-1138

ATTACHMENT B

Southern New England Telephone
530 Preston Avenue
Meriden, Connecticut 06450
Phone (203) 634-6311
Facsimile (203) 634-9331

James A. Van Der Beek
Account Manager
Network Marketing and Sales

February 4, 1997

Mr. Dennis M. Doyle
Arch Communications Group, Inc.
1800 West Park Drive
Suite 350
Westborough, MA 01581-3912

Dear Mike,

In response to your January 29, 1997 letter to me, SNET agrees with Arch Communications that the "one-way" trunk groups, or entrance facilities, should not carry a monthly recurring charge. SNET will try to have that recurring charge eliminated from your monthly bill by the March billing cycle. In addition, SNET will credit the appropriate charges retroactive to November 1, 1996.

A letter of policy regarding other charges affected by the FTA 1996 will be sent to you within the next 30-45 days. Please call me to offer your input based upon that letter. If you have any other questions, I can be reached at (203) 634-6311.

Thank you for your patience and input.

Sincerely,

James Van Der Beek